United International Investigative Services, Inc. *and* National Union of Security Officers and Guards. Case 21–CA–35019

September 30, 2002

ORDER DENYING MOTION

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

On May 29, 2002, the General Counsel issued a complaint alleging that the Respondent violated Section 8(a)(5) and (1) by unilaterally changing employee terms and conditions of employment and by failing to give the Union notice and an opportunity to bargain over the effects of its decision to cease operations. The Respondent, acting pro se, timely filed a letter, dated June 17, 2002, in response to the complaint allegations.

On July 1, 2002, the General Counsel filed a Motion for Summary Judgment with the Board. On July 2, 2002, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. Having duly considered the matter, the Board denies the General Counsel's motion on the ground that it raises genuine issues of material fact, which would better be resolved after a hearing before an administrative law judge.

The General Counsel contends that, under Section 102.20 of the Board's Rules and Regulations, the Respondent's June 17 letter does not constitute an acceptable answer because it does not clearly admit, deny, or explain each of the complaint allegations. However, the Board "typically has shown some leniency toward a pro se litigant's efforts to comply with our procedural rules." *Mid-Wilshire Health Care Center*, 331 NLRB 1032 (2000), and cases cited therein. We have therefore evaluated the Respondent's June 17 letter under the more lenient standard applicable to pro se respondents. Under this standard, we find that the letter is an acceptable answer because it specifically addresses the substance of the complaint allegations. Further, as stated, we find that the letter raises genuine issues of material fact. Therefore, the General Counsel's motion must be denied.[1]

ORDER

It is ordered that the General Counsel's motion is denied and the proceeding is remanded to the Regional Director for Region 21 for further appropriate action.

MEMBER BARTLETT, concurring.

I agree that the Respondent's pro se letter raises genuine issues of material fact that warrant denial of the General Counsel's Motion for Summary Judgment and remand of this case. I further note, as does Member Liebman (see fn. 1, supra), that the Respondent has not moved to dismiss the complaint based on the legal issues raised by Member Cowen in his dissent. I, therefore, do not address those issues. But see my concurring opinion in *Baptist Hospital of East Tennessee*, 338 NLRB 249 (2002), where I stated that the Board should *sua sponte* defer processing 8(a)(5) contract-breach allegations until after the parties have exhausted the possibility of resolving their contractual dispute through their own agreed-upon dispute resolution procedures, i.e., contractual grievance and arbitration systems, or, in the absence of applicable procedures for arbitrable resolution, Section 301 of the Act.

MEMBER COWEN, dissenting.

I agree with my colleagues that the Respondent's June 17, 2002 letter constitutes an acceptable answer to the complaint under the standards applied by the Board to pro se respondents. I also agree that the General Counsel's Motion for Summary Judgment must be denied.

[1] The Respondent has not moved to dismiss the complaint based on the legal theories raised in the dissent. Therefore, Member Liebman finds no need to address those issues.

In addition, with respect to the alleged failure to pay accrued wages and benefits, Member Liebman observes that the Board recently rejected the dissent's position in a similar case. See *Scapino Steel Erectors*, 337 NLRB 992, 993 fn. 3 (2002); see also *Oak Cliff-Golman Baking Co.*, 207 NLRB 1063, 1064 (1973), enfd. 505 F.2d 1302 (5th Cir. 1074), cert. denied 423 U.S. 826 (1975) (rejecting employer's argument that decision not to adhere to contractual wage rate was breach of contract, but not unfair labor practice). With respect to the alleged failure to bargain over the effects of the decision to cease operations, Member Liebman rejects the dissent's claim that the complaint is fatally defective. In her view, the complaint is sufficiently specific to apprise the Respondent of the violation with which it is charged. Therefore, the complaint satisfies the requirements of Sec. 102.15 of the Board's Rules, which provides that the "complaint shall contain . . . a clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed." As the Second Circuit stated in *Douds v. Longshoremen*, 241 F.2d 278, 283–284 (2d Cir. 1957), "The complaint, much like a pleading in a proceeding before a court, is designed to notify the adverse party of the claims that are to be adjudicated so that he may prepare his case, and to set a standard of relevance which shall govern the proceedings at the hearing." In any event, Member Liebman observes that an employer's decision to cease operations and lay off its employees "obviously [has] material, substantial, and significant effects on terms and conditions of employment." See the judge's discussion of Board precedent in *Mitchellace, Inc.*, 321 NLRB 191, 193 (1996). Therefore, in Member Liebman's view, it is elevating form over substance to argue, as the dissent does, that the complaint is deficient merely because it does not separately allege the impact of the Respondent's unilateral conduct on employee terms and conditions of employment.

The majority would remand this case for a hearing. I would not. For the reasons that follow, I would find that the complaint fails to allege any cognizable violation of the Act. Accordingly, I would resolve this case by dismissing the complaint.

The complaint alleges, in substance, that the Respondent violated Section 8(a)(5) by failing to pay accrued wages, vacation pay, and overtime to its unit employees. The complaint also alleges that the Respondent violated Section 8(a)(5) by laying off the unit when it ceased providing guard services under a contract with the California Highway Patrol, without prior notice to the Union or an opportunity to bargain about the effects of the cessation of operations. The Respondent's answer concedes that it failed to pay some accrued wages and benefits, but asserts, contrary to the allegations of the complaint, that the Respondent provided the Union with adequate notice of its actions.

With regard to the failure to pay accrued wages and benefits, the only issue in this case is what remedial action is warranted for the Respondent's alleged refusal to honor the terms of the parties' collective-bargaining agreement. Thus, the issue in this case is merely a question of contract enforcement. In my view, the Board should not be involved in such questions, and the parties should be left to resolve their dispute through traditional contract enforcement mechanisms. *See United Telephone Co. of the West*, 112 NLRB 779, 782 (1955) ("The Board is not the proper forum for parties seeking to remedy an alleged breach of contract or to obtain specific enforcement of its terms.").

I do not suggest that the Board never has a role in reviewing the validity, scope, or enforceability of a collective-bargaining agreement. If a contract dispute presents an issue of statutory interpretation or an issue within the Board's primary jurisdiction, the Board has a duty to express itself on those issues. However, where no such issue is present, and the question is merely one of contract interpretation or enforcement, the Board should not insert itself into such disputes.

Congress did not intend for the Board to become embroiled in contractual disputes of the sort before us today. As the framers of the Taft-Hartley Act stated, and the Board has long recognized,[1] "[o]nce parties have made a collective-bargaining contract, the enforcement of that contract should be left to the usual process of the law and not to the National Labor Relations Board."[2] Simply put, mere breaches of contract are not unfair labor practices.

The allegation that the Respondent laid off unit employees without first providing the Union with notice and an opportunity to engage in effects bargaining also fails, as a matter of law, to allege an unfair labor practice. Although the complaint alleges that the layoff was a mandatory subject of bargaining, it fails to allege that the layoff constituted a unilateral change in terms and conditions of employment.[3] To establish a prima facie case in the situation before us, the General Counsel must show that

> (1) the Union was the bargaining representative of the laid-off employees at the time of their layoff, (2) the layoff was a mandatory subject of bargaining, (3) the Company did not give notice to, nor did it bargain with, the Union about the decision to have a layoff or its impact on unit employees, and (4) the layoff constituted a material, substantial, and significant change in the terms and conditions of employment of unit employees.

Taino Paper Co., 290 NLRB 975, 978 (1988). The Board has consistently reaffirmed that it is not enough that an alleged unilateral change involves a mandatory subject of bargaining; it also must be a material, substantial, and significant change in terms and conditions of employment to trigger the employer's statutory bargaining obligation. Id. at 977–978 (citing *United Technologies Corp.*, 278 NLRB 306 (1986)); *Golden Stevedoring Co.*, 335 NLRB 410, 415 (2001) (quoting *Millard Processing Services*, 310 NLRB 421, 425 (1993)); *Peerless Food Products*, 236 NLRB 161 (1978). Although the complaint in this case alleges the first three elements of a prima facie case, the General Counsel has not alleged that the layoff constituted a change in unit employees' terms and conditions of employment, let alone a material change. Thus, an element of the prima facie case is

[1] See, e.g., *Packinghouse Workers*, 89 NLRB 310, 317 fn. 10 (1950); *United Telephone Co. of the West*, 112 NLRB 779, 782 (1955).

[2] H.R. Cong. Rep. No. 510, 80th Congress, 1st Sess. 42; I Leg. Hist. 546 (LMRA 1947). See also *NLRB v. Strong*, 393 U.S. 357, 360 (1969): "[T]he Board has no plenary authority to administer and enforce collective bargaining contracts. Those agreements are normally enforced as agreed upon by the parties, usually through grievance and arbitration procedures, and ultimately by the courts."

I recognize that the Board "may proscribe conduct which is also a breach of contract remediable as such by arbitration and in the courts." Id. at 359. See also *NLRB v. C&C Plywood Corp.*, 385 U.S. 421, 428 (1967). I simply do not view the instant case as involving the types of breaches that require the Board to exercise its jurisdiction over unfair labor practices instead of requiring the parties to grieve/arbitrate the matter or litigate it in court. See, e.g., Sec. 301 of the LMRA.

[3] Cf. *Kal-Die Casting Corp.*, 221 NLRB 1068 (1975) (routine production scheduling and adjustments relating to diminishing available hours of work without bargaining with the union does not violate 8(a)(5) in the absence of evidence that this activity varied from the employer's past practice); *KDEN Broadcasting Co.*, 225 NLRB 25, 35 (1976) (failure to bargain over scheduling changes not violative of Sec. 8(a)(5) in absence of evidence that changes inconsistent with employer's past practice of making scheduling changes).

missing from the complaint allegation, and the Board cannot find a violation of Section 8(a)(5).[4]

For the foregoing reasons, the General Counsel's motion for summary judgment should be denied and the complaint should be dismissed.

[4] The General Counsel well knew the importance of alleging change as an element of a violation in this proceeding. To that end, he alleged the failure to pay accrued wages, vacation pay, and accrued overtime pay was a change in the employees' terms and conditions of employment. The complaint included no such allegation regarding the layoff.

And for the sake of clarity, I note that *Mitchellace, Inc.*, 321 NLRB 191 (1996), cited by Member Liebman at fn. 1, did not involve, and has no discussion regarding, an employer's decision to cease operations and lay off employees.